

BEFORE THE POSTAL REGULATORY COMMISSION  
WASHINGTON, D.C. 20268-0001

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Complaint of the Greeting Card Association

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Docket No. C2020-2

PITNEY BOWES INC. MOTION TO DISMISS  
THE COMPLAINT OF THE GREETING CARD ASSOCIATION  
(February 19, 2020)

Pitney Bowes Inc. (Pitney Bowes) respectfully submits this motion to dismiss in response to the complaint filed by the Greeting Card Association (GCA) concerning the Single-Piece Metered Letters rate (meter rate).<sup>1</sup> Although styled as a claim of unreasonable discrimination, GCA's Complaint is simply a repackaged and legally unsustainable objection to the five-cent increase in the Stamped Letters price the Commission has previously approved. GCA's Complaint repeats arguments that the Commission has previously considered and rejected, and presents no sound reason for the Commission to revisit those matters now. GCA's contention that the Metered Letters rate creates undue and unreasonable discrimination misstates the nature and purpose of the price differential for metered letters and ignores the statutory basis for its authorization.

As the Commission has previously acknowledged, the Metered Letters rate is a proper application of the Postal Service's pricing flexibility under the Postal Accountability and Enhancement Act (PAEA, or the Act), Pub. L. No. 109-435, 120 Stat. 3198 (Dec. 20, 2006), as a nonworkshare policy-based pricing differential expressly authorized as a rate of "unequal magnitude within, between, or among classes of mail" under 39 U.S.C. § 3622(b)(8). The Commission has also previously concluded numerous times that the Postal Service has amply justified the meter rate as a means of encouraging the use of a more secure and more efficient payment channel. The Postal Service has explained that the Metered Letters rate is also

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<sup>1</sup> Complaint of the Greeting Card Association, Docket No. C2020-2 (Jan. 30, 2020) (GCA Complaint).

intended to provide small- and medium-sized business mailers an incentive not only to keep using First-Class Mail, but also to use other Postal Service shipping products to expand their businesses. The pricing differential reflects the Postal Service's business judgment that customers with postage meters will enjoy more efficient access to the Postal Service's mail and package products and, thus, have an incentive to keep using them. GCA has provided no basis on which the Commission should revisit these prior determinations or second guess the Postal Service's legitimate business judgment in offering the rate. GCA's Complaint should be dismissed.

# **I. THE COMMISSION HAS ALREADY REJECTED PRIOR CHALLENGES TO THE METERED LETTERS RATE ON MULTIPLE OCCASIONS**

The meter discount has been challenged on at least three separate occasions since it was first introduced 2013, and on the same grounds GCA seeks to raise again now. Nothing in GCA's complaint warrants overturning the Commission's prior decisions.

The PAEA expressly encourages the use of the Postal Service's "pricing flexibility to increase mail volume and operational efficiency." 39 U.S.C. § 3622(c)(7); *see also* 39 U.S.C. § 3622(b)(4) (noting an objective of the Act "to allow the Postal Service pricing flexibility"). The PAEA also expressly authorizes the Postal Service, as part of a "just and reasonable" rate schedule, to make changes "of unequal magnitude within, between, or among classes of mail." 39 U.S.C. § 3622(b)(8). In 2013, the Postal Service relied on this statutory authority and the Commission's express encouragement<sup>2</sup> in proposing a non-workshare policy-based price differential for metered mail, which the Commission approved in Docket No. R2013-10.

In proposing the discount, the Postal Service noted the many advantages of a special meter rate, noting that, where it had been adopted by foreign posts experience showed that it

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<sup>2</sup> *See* Docket No. RM2010-13, Order No. 1320 (Apr. 20, 2012) at 11, n.22 ("The convention of setting the rate for the metered mail Base Group equal to the single-piece letter rate is not an issue that was explored on this record. *However, there does not appear to be any obvious legal barrier to the Postal Service exercising its pricing flexibility by setting the rate for the metered mail Base Group at a different level than the remainder of single-piece First-Class letters.* Moreover, the relative sophistication of users of the metered mail Base Group and the capabilities of metered and IBI technology suggest that a non-integer rate for this type of mail would be more workable than for other types of single-piece First-Class Mail.") (emphasis added).

encourages meter use for correspondence, transactional and/or marketing-related communication. This, in turn, also results in: (1) customer convenience and productivity gains for mailers, particularly small and medium-size businesses; (2) operational savings for the Postal Service because there is less need for stamp production and less costs incurred for distribution and cancellation; (3) lower postal revenue-protection risk associated with theft of stamps; and (4) more cross-selling opportunities. Once again, experience from foreign posts suggests that the availability and convenience of metering capability led to increase usage of the postal service offerings rather than those of the competitors.

Docket No. R2013-10, United States Postal Service Notice of Rate Adjustment (Sept. 26, 2013) at 20. *See* Order No. 1890 (Nov. 21, 2013) at 46 (summarizing these benefits).

GCA and another commenter objected at the time that the proposed discount was not cost justified. The Commission dismissed this objection that the rate be cost justified, holding that there was no support in the record for finding that the “proposed rates establish a workshare discount ‘for the presorting, prebarcoding, handling or transportation of mail’ within the meaning of 39 U.S.C. § 3622(e)(1),” or that “metered and stamped letters have similar demand characteristics because they target the same market or that the two categories cost the Postal Service different amounts to handle and deliver because of differing amounts of preparation that the mailer has elected to do, as would be required to establish that there is a worksharing relationship between the two categories.” Order No. 1890 at 46.

The Commission’s Annual Compliance Determination for 2013 found the meter rate to be a non-workshare, policy-based pricing differential that is “consistent with the Postal Service’s goal of encouraging the use of meters rather than stamps.” Docket No. ACR2013, Annual Compliance Determination Report (Mar. 27, 2014), at 72. The Commission found GCA’s “assertion that the rate structure for Metered Letters may be irrational is not well supported.” *Id.* at 71-72. The Commission had also noted the experience of foreign posts that “a lowered metered rate provides customer convenience, operational savings, lower risk from stamp theft and more cross-selling opportunities,” *see* Order No. 1890 at 46-47, and did not note any evidence in GCA’s submission to the contrary.

In its Annual Compliance Determination the next year, following a renewed challenge by GCA to the meter rate, the Commission reaffirmed its conclusion that a price differential for Metered Letters was appropriate. It found the differential to be “based on a rational explanation presented by the Postal Service that supported pricing Stamped and Metered Letters differently,” and to be “an appropriate exercise of the Postal Service’s pricing flexibility.” Docket No. ACR2014, Annual Compliance Determination Report (Mar. 27, 2015), at 68. The Commission’s rulings approving the price differential for Metered Letters were consistent with its prior holdings that the Postal Service has the pricing flexibility to adopt non-uniform prices within a class. *See, e.g.*, Docket No. ACR2012, Annual Compliance Determination Report (May 7, 2013), at 82 (“Market dominant mailers have the protection of a price cap to shield them from excessive price increases. One objective of section 3622 is to allow the Postal Service pricing flexibility. Because the Consumer Price Index (CPI) cap is applied at the class level rather than the product level, it gives the Postal Service the ability to apply non-uniform price adjustments within a class.”).

In challenging the initial meter rate, GCA argued that it did not satisfy section 3622(b)(8), which requires rates to be just and reasonable, and that there was “no need” for it. Implicitly recognizing the weakness of the argument, GCA did not even try to argue that the unreasonable discrimination language in section 403(c) controlled or somehow overrode the explicit authorization of differential pricing set out in section 3622(b)(8). *See* GCA Complaint at 4 (stating that GCA’s 2013 comments “relied mainly” on section 3622(b)(8)). Looking to section 3622(b)(8) rather than section 403(c) to address the matter was quite natural, because it is the specific provision of the Act that addresses price differentials within classes of mail, such as a difference between Metered Letters and Stamped Letters within First-Class Mail, and because section 3622(b)(8) expressly authorizes price changes of “unequal magnitude within, between or among classes of mail.” Perhaps because the PRC already, and properly, rejected a challenge under 3622(b)(8), GCA’s current complaint all but ignores that section, and attempts to rely instead on section 403(c).

But GCA is wrong to contend that that the Commission has not previously considered whether, and found, that the Metered Letters rate does not run afoul of the unreasonable discrimination language of section 403(c). *See* Complaint at 9. In particular, the American Postal Workers Union (APWU) cited section 403(c) in its ACR2014 comments. *See* Initial Comments of American Postal Workers Union, AFL-CIO, Annual Compliance Report FY 2014, Docket No. ACR 2014, at 8-10 (February 2, 2015); *see also* Reply Comments of Pitney Bowes Inc., Docket No. ACR 2014 (Feb. 13, 2015). The Commission rejected APWU's arguments that the meter rate violated section 403(c), holding:

To conclude that the Postal Service violates 39 U.S.C. § 403(c), the Commission must find that the price discrimination between Stamped and Metered Letters is either "undue or unreasonable." The Commission approved the establishment of the Metered Letters price in Docket No. R2013-10, based on a rational explanation presented by the Postal Service that supported pricing Stamped and Metered Letters differently. The same reasons justify its continuation. Furthermore, the Commission finds that the price differential between Stamped and Metered Letters is an appropriate exercise of the Postal Service's pricing flexibility.

Docket No. ACR2014, Annual Compliance Determination Report (Mar. 27, 2015), at 68.

In 2017 the meter rate differential was increased. In comments supporting the expansion, one party, Stamps.com, noted that its customers took advantage of the metered mail discount, and that it received considerable positive attention. *See* Docket No. R2017-1, Comments of Stamps.com (Nov. 1, 2016) at 2. It led customers to use the service and "to think of the Postal Service as more businesslike." *Id.* It also led customers to "purchase postage for multiple categories of mail, including parcels and Priority, not just for First-Class letters." *Id.* Commenters submitted that it would be unjust and unreasonable to oppose the efficient signals provided by the meter discount.

The Commission rejected GCA's assertions that the expanded price differential "has not succeeded in its promotional purpose, and that any purported cost savings or volume retention is unproven," and that the differential "violates the objectives designed to assure the Postal Service has 'adequate revenue' pursuant to 39 U.S.C. § 3622(b)(5) and to establish and maintain a 'just

and reasonable schedule of rates’ pursuant to 39 U.S.C. § 3622(b)(8).” *See* Docket No. ACR2016, Annual Compliance Determination Report (March 28, 2017), at 75. In particular, the Commission reasoned that GCA’s assertion that the meter rate was “promotional,” thus requiring it to meet certain criteria, was incorrect, as it was inconsistent with the Postal Service’s proper characterization of the price differential as a “legitimate rate, based on important mail characteristics” that plays a “beneficial role in helping to provide a low-cost postal mainstream.” *Id.* The Commission then concluded, citing section 3622(b)(8), that the rate “is consistent with the Act, as one objective of the PAEA is to allow the Postal Service pricing flexibility, subject to the inflation-based cap and that this flexibility can be used to apply non-uniform price adjustments within a class.” *Id.*

The matter was not raised or discussed in the 2017 or 2018 Annual Compliance Determination reports. In 2019 the Metered Letters price differential was increased as a consequence of raising the Stamped Letters rate as part of the First-Class Mail rate design.

GCA now comes to complain about the “present rate structure” within First-Class Mail, with a proposed remedy that would reverse the five-cent increase to the Stamped Letter rate. Complaint at 1. That increase was challenged in the *Carlson* case, which led to a court order that required more explanation of the increase but did not suggest in any way that the Commission did not have the authority to approve it.<sup>3</sup> The Commission has provided that explanation, and reaffirmed the increase twice.<sup>4</sup> GCA states that the primary legal basis of its complaint is distinct from the challenge advanced in *Carlson*, but the remedy GCA is seeking is the same. *See id.* at 3. GCA’s complaint thus covers ground it has already traversed without success many times over. GCA offers no reason for the Commission to revisit its prior consideration and approval of the Metered Letters rate. GCA’s complaint should be dismissed.

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<sup>3</sup> *See Carlson v. Postal Regulatory Commission*, 938 F.3d 337 (D.C. Cir. 2019).

<sup>4</sup> *See* Docket No. R2019-1, Order No. 5285 (Oct. 24, 2019); Docket No. R2020-1, Order No. 5373 (Dec. 20, 2019).

## **II. GCA’S COMPLAINT PROVIDES NO BASIS TO REVISIT THE COMMISSION’S PRIOR DETERMINATIONS UPHOLDING THE METER RATE**

### **A. GCA’s cost justification arguments are irrelevant because, as GCA concedes and the Commission has previously recognized, the Metered Letters rate is not a workshare discount**

The Complaint includes pages of discussion regarding Single-Piece Letters mail processing and delivery costs that purport to show the meter discount is “not justified by a difference in cost-to-serve.” GCA Complaint, at 21. As noted at page 12, n.6, *infra*, this analysis is incomplete and incorrect on its own terms, and provides no support for GCA’s complaint. In any event, it is irrelevant because the meter rate is not a workshare discount required to be justified on the basis of avoided costs, a point GCA concedes. *Id.* Instead, as the Commission has repeatedly held, the Metered Letters rate is a nonworksharing policy-based pricing differential designed to encourage small business mailers to use a more secure, efficient payment channel and to use Postal Service products to expand their business. The Commission has also repeatedly and correctly held that this type of policy-based pricing differential is expressly authorized by section 3622(b)(8).

GCA’s concession that the Metered Letters rate is not a workshare discount is compelled by the Commission’s precedent. Indeed, when the Commission approved the first proposed meter rate, it found no support in the record to suggest that the Postal Service had proposed the discount based on workshare principles and, thus, rejected GCA’s argument that the meter discount should be rejected as inadequately cost-justified. *See, e.g.*, Order No. 1890 at 49. Instead, from its inception the meter rate has been used as a pricing incentive to encourage small- and medium-sized business mailers to use more efficient payment-evidencing channels such as postage meters, kiosks, PC Postage, permit, and on-line stamp sales, and not a “workshare discount” within the meaning of 39 U.S.C. § 3622(e)(1); thus, the cost-based limitations of section 3622(e) are irrelevant.

The widespread adoption of channel-based pricing by other national postal operators is itself probative of the Postal Service’s rational and legitimate basis for adopting a Metered Letters rate. GCA has not questioned the international experience that has been cited to illustrate the benefits that may accrue from a meter rate, but instead asserts, wrongly, that the Postal Service is legally barred from pursuing similar benefits. To the contrary, the PAEA expressly encourages “pricing flexibility to increase mail volume and operational efficiency,” 39 U.S.C. § 3622(c)(7), *see* 39 U.S.C. § 3622(b)(4) (“pricing flexibility” is one of the Act’s objectives), and expressly authorizes price changes of “unequal magnitude within, between or among classes of mail.” 39 U.S.C. § 3622(b)(8). The Metered Letters rate also furthers the statutory objectives of enhancing mail security and deterring terrorism, *see* 39 U.S.C. § 3622(b)(7), and takes into account the statutory factors of promoting intelligent mail and of secure, sender-identified mail, *see* 39 U.S.C. § 3622(c)(13). For all of these reasons, the Metered Letters rate is a fully appropriate use of this channel-based pricing flexibility.

**B. GCA’s contention that policy goals of the Metered Letters rate have not been realized is unproven and irrelevant**

GCA’s complaint asserts that the Metered Letter rate has “failed in its declared purpose as a promotion.” GCA Complaint at 22. This assertion is wrong in every respect. The rate is not a “promotion.” And despite GCA misstating or ignoring the actual purposes of the meter rate it is, in fact, achieving the purposes for which it was proposed and authorized.

GCA asserts throughout its complaint that the Metered Letters price differential has a “promotional” goal of increasing volume in metered letters, *see, e.g.*, GCA Complaint at 4, 6, 16, 22, and contrasts it with “various promotions the Postal Service has initiated to encourage the use of new technologies.” *Id.* at 26. As noted above, the Commission has previously held that GCA’s characterization of the meter rate as a “promotion” is incorrect. The rate’s actual purposes are those set out by the Postal Service and accepted by the Commission: customer convenience and productivity gains, particularly for small- and medium-size businesses, operational savings for the Postal Service due to reduced stamp costs, revenue-protection and risk



reduction, and increased cross-selling opportunities. *See* Order No. 1890 at 46. The Postal Service’s business judgments on the matter are the type to which the Commission and other reviewing agencies regularly defer. *See, e.g., UPS Worldwide v. United States Postal Service*, 66 F.3d 621, 634-35 (3d Cir. 1995) (affirming Postal Service decision on international mail arrangements because it “reflects a reasonable business decision about the most effective means to solicit new customers;” Postal Service acted properly in basing more favorable treatment on a customer’s “capability . . . rather than actual performance” and deference to that decision was consistent with the intent of the postal reform laws to allow the Postal Service to adopt “modern business practices”); *Bovard v. United States Postal Service*, 47 F.3d 1178 (10th Cir. 1995) (rejecting section 403(c) unreasonable discrimination claim based on deference to Postal Service’s “reasonable decision, rationally related to the effectuation of the Postal Service’s statutory objectives of providing efficient delivery of the mails” (citing *Egger v. United States Postal Service*, 436 F. Supp. 138, 142 (W.D. Va. 1977))); *see also Grover City v. United States Postal Service*, 391 F. Supp. 982, 986 (C.D. Cal. 1975); *Agreement No. 2598*, 17 FMC 286, 297 (Federal Maritime Comm’n 1974) (agency addressing a claim of undue or unreasonable advantage recognized that the regulated business is “the proper body to weigh and evaluate business risks . . . in the first instance”; that it is “not our function to gainsay the day-to-day economic decisions of the [business], nor would it be appropriate for us to do so,” and that “it is not the function of this agency to substitute its judgment for that of the [regulated entity]”).

GCA’s Complaint fails to even address the benefits of a more secure and efficient payment channel and thus provides no basis for any suggestion that that goal is not being met. *See* 39 U.S.C. §§ 3622(b)(7) (noting the Act’s objective to “enhance mail security and deter terrorism”) and 3622(c)(13) (noting the “the value to the Postal Service and postal users of promoting intelligent mail and of secure, sender-identified mail”). Nor does GCA address the goal of providing small- and medium-sized business mailers an incentive not only to keep using First-Class Mail, but also to use other Postal Service shipping products to expand their business,

despite the highly plausible supposition advanced by the Postal Service, and recognized by the Commission, that customers with postage meters will enjoy more efficient access to the Postal Service's mail and package products and thus have an incentive to keep using them. Survey results presented by Stamps.com when the Metered Letter rate differential was increased validate this concept. Stamps.com reported that small- and medium-sized business mailers were aware of the price differential, with many basing their mailing decisions on it. *See* Stamps.com Comments at 3-4. Publicly available marketing materials demonstrate that many postage meter and PC postage solutions providers are actively marketing the price differential in their materials encouraging small- and medium-sized businesses to use Postal Service products to expand their business.

All of these potential efficiency gains meet the statutory objective in section 3622(b)(1) of rates that "maximize incentives to reduce costs and increase efficiency." *See also* Docket No. R2009-2, Order No. 191 (Mar. 16, 2009), at 28 (approving the Full Service Intelligent Mail barcode discount as a nonworkshare, policy-based pricing differential that supports the operational efficiency of the Postal Service).

The only area the GCA Complaint does attempt to address is mail volume, and even there it incorrectly frames the issue as whether the discount has led to "increasing metered volume." GCA Complaint at 25. GCA performed no analysis at all to isolate the effect of the discount on volume and, thus, its analysis is meaningless. Rather, GCA presents a chart comparing Metered and Stamped Single-Piece First Class Mail Letters, and invites the reader to eyeball the chart to conclude that the "trends are fairly close to parallel." *Id.* at 23. In fact, Stamped Letters have declined more than Metered Letters, and thus GCA's complaint fails even on its own terms to present an issue requiring the Commission's further consideration.

GCA argues that FY 2015-18 data show that the declines in metered and stamped mail are roughly similar – saying the lines graphing the decline are "fairly close to parallel." *Id.* at 23. But from FY 2015 to FY 2016 metered mail declined 1.8 percent (7705/7568), while stamped

mail declined 5.8 percent (11603/10926). The decline in stamped mail was thus 3.28 times greater than the decline in metered mail. The declines in each were similar in FY2017, but in FY 2018 the pattern returned with metered mail declining 3.4 percent (7119/6879), while stamped mail declined 6.2 percent (10274/9636). The decline in stamped mail was thus 82 percent greater than the decline in metered mail in FY2018. In summary, the data cited by GCA in its own complaint demonstrate that Metered Letters have declined at a substantially slower rate than Stamped Letters. The inference is strong that, just as the Postal Service supposed in proposing the discount, this result is due to incentives to use metered mail, and the fact that mailers who invest in meters are less likely to switch away from the Postal Service. GCA has failed to present any econometric data or other evidence to show that in the absence of a Metered Letters rate, metered letter volumes would not have declined even faster.

GCA's empirical critique of the Metered Letter rate as not protecting volume or incentivizing meter use thus fails, and GCA has not even addressed other purposes of the rate. Moreover, even if GCA's Complaint had provided probative evidence that the Metered Letters rate is not yet yielding the results GCA would prescribe, which it does not, that would not make it unlawful.

### **C. GCA's "revenue sacrifice" arguments are simply wrong**

GCA contends that the Metered Letters rate is per se "unreasonable in relation to the sec. 3622(b)(5) objective of adequate revenue" because it leads to an unnecessary and unproductive "revenue sacrifice." GCA Complaint at 4, 6, 22-26. As set out at pages 8-10 above, the predicate of this argument that the Postal Service is getting nothing for the differential is incorrect and is based on GCA's ignoring of the actual purposes and benefits of the rate. And again, even if the predicate were correct, which it is not, GCA's adequate-revenue and revenue-loss arguments are meritless.

GCA concedes that under a revenue-based price cap the Postal Service is "compelled, as a practical matter, to increase prices as near to the cap as circumstances permit." GCA Complaint

at 32. This concession reveals that the overall amount of revenue collected under the cap is unchanged by the meter rate. GCA's real complaint is that the rate deaveraging within First-Class Mail means that a reduction in the Metered Letters price or Presort prices leads to an offsetting increase in other First-Class Mail rates, namely Stamped Letters. But that complaint serves to confirm that the revenue effect to the Postal Service under a statutory price cap is neutral, there is no "revenue sacrifice" and, thus, no possible violation of section 3622(b)(5).

If anything, consideration of extended revenue effects under a revenue-based price cap suggest that a larger Metered Letters price differential would benefit the Postal Service financially to the extent it stimulates new Presort volumes or stems the erosion of existing volume. Because Presort Letters contribute on average about 7 cents more per piece relative to Single-Piece Letters,<sup>5</sup> a First Class Mail rate design that incentivizes lower cost, more profitable Presort Letters will further the revenue objectives of the PAEA.

GCA's efficiency argument is equally weak. GCA devotes a single-paragraph, GCA Complaint at 31, to the alleged violation of section 3622(b)(1). GCA states that because the price differential has not drawn new meter volume it has not increased cost savings. As set out above this assertion fails on multiple levels because GCA ignores the stated efficiency and cost savings USPS has actually asserted from incentivizing a more efficient payment channel.<sup>6</sup>

### **III. GCA'S UNREASONABLE DISCRIMINATION CLAIMS ARE LEGALLY UNSUPPORTABLE**

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<sup>5</sup> Docket No. ACR2019, USPS-FY19-1, Public\_FY19CRAReportRev.1.10.2020.xlsx, "Cost1", cells P14 and P11.

<sup>6</sup> As noted above, GCA's attempts throughout the Complaint to argue that the meter rate is not cost justified are irrelevant to its legality because it is not a workshare discount. These arguments do, however, suggest that GCA is principally concerned with reducing the rate for Stamped Letters rather than the lawfulness of nonworkshare price differentials. First, GCA concedes that the initial meter rate differential, which GCA reflexively opposed, was in fact more than cost-justified. GCA Complaint at 32. Accepting GCA's erroneous argument then would have forced the Postal Service to leave provable and recognized efficiencies on the table, and the same is true today. GCA's approach also fails to consider all relevant costs of stamped mail, including obvious costs associated with stamp production, distribution, and cancellation, and even so concedes that metered mail is cheaper to process. GCA's cost argument also entirely ignores the rationale advanced by the Postal Service that small- and medium-sized business customers that use meters or PC Postage solutions are more likely to use Postal Service letter and package services to help expand their business. GCA does not even attempt to provide an argument as to why these benefits cannot be considered in establishing a Metered Letter rate, and there is none.

#### **A. GCA's section 403(c) claim fails as a matter of law**

As noted above, GCA's past unsuccessful challenges to the meter rate relied on section 3622(b)(8), the provision of the Act that directly authorizes rates of "unequal magnitude within, between, or among classes of mail." GCA now focuses its attention on section 403(c), which prohibits undue or unreasonable discrimination or preference among mail users. GCA's argument that the Metered Letters rate violates section 403(c) is also without merit, as the Commission found in rejecting a prior section 403(c) challenge. *See supra* page 5.

Section 403(c), part of the "[g]eneral duties" of the Postal Service states:

In providing services and in establishing classifications, rates, and fees under this title, the Postal Service shall not, except as specifically authorized in this title, make any undue or unreasonable discrimination among users of the mails, nor shall it grant any undue or unreasonable preferences to any such user.

39 U.S.C. § 403(c). In order to establish a claim of undue discrimination under section 403(c), a complainant must establish three elements: (1) a showing that the favored and disfavored mailers are "similarly situated;" (2) discrimination in fact—differential pricing or terms of service; and (3) the absence of a rational or legitimate basis for the different price or terms of service. *See* Order No. 718, PRC Docket No. C2009-1 (Apr. 20, 2011), at 28.

Oddly, GCA spends a good deal of time in its complaint outlining the many ways in which household mailers are not similarly situated to the business mailers who supposedly benefit from the discrimination GCA alleges. *See* GCA Complaint at 14-17. Indeed, GCA never expressly explains how the two groups of mailers are similarly situated. GCA's only discussion of the issue comes on page 31 of its Complaint, where it acknowledges that users of single-piece and Presort letters are *not* similarly situated. GCA asserts that this is "unlike" users of metered and stamped mail, this suggesting they are similarly situated, but again never explains how. *Id.* GCA states that the two groups of users are "indicia-differentiated, but otherwise indistinguishable," *id.*, but elsewhere in its complaint refers to the differences in indicia in the context of "like service," and not whether the two groups of users it identifies are similarly situated, *id.* at 11.

GCA's complaint can thus be dismissed for failure to properly allege that favored and disfavored users are similarly situated. Even if GCA were able to overcome this hurdle, GCA could still not state a prima facie claim of unreasonable discrimination because, as the Commission has repeatedly found, that the Postal Service has identified a rational and legitimate basis for the price differential for Metered Letters. Accordingly, GCA's section 403(c) argument fails as a matter of law.

Courts and the Commission considering unlawful discrimination claims under section 403(c) begin by recognizing that, by its plain terms, section 403(c) does not prohibit price discrimination generally, but rather prohibits only "undue or unreasonable" price discrimination. As a federal appellate court has reasoned, the statute's use of the terms "undue and unreasonable" necessarily means Congress understood that some discrimination among mail users is permissible. *See UPS Worldwide*, 66 F.3d at 634 ("We cannot ignore that the 'undue or unreasonable' language, twice repeated in § 403(c), means that reasonable discrimination and preferences among users of the mail are permitted.").

In assessing reasonableness, courts and the Commission have looked to whether the Postal Service has asserted a rational basis for the differential treatment. Here, as the Commission has previously acknowledged, the Postal Service has justified the Metered Letters rate as a means of encouraging the use of a more secure, efficient payment channel. *See supra* pages 2-6. The Postal Service has also explained that the Metered Letters rate is intended to provide small- and medium-sized business mailers an incentive not only to keep using First-Class Mail, but also to use other Postal Service shipping products to expand their business. *Id.* The pricing differential is thus based in part on the Postal Service's rational business judgment that customers with postage meters will enjoy more efficient access to the Postal Service's mail and package products and, thus, have an incentive to keep using them. This also suggests that the Postal Service does not consider users of the two channels to be similarly situated, and as noted above GCA's fails to adequately support this necessary element of its claim.

Courts and the Commission have afforded the Postal Service “broad latitude” to implement differential prices or terms of service where a legitimate purpose has been advanced. *See UPS Worldwide*, 66 F.3d at 634 (citing *Mail Order Ass’n of America v. United States Postal Service*, 2 F.3d 408, 434 (D.C.Cir.1993) (*MOAA*)). The Commission has previously ruled that the Postal Service’s stated rationale in support of the Metered Letters rate is consistent with this precedent:

The Commission approved the establishment of the Metered Letters price in Docket No. R2013-10, based on a rational explanation presented by the Postal Service that supported pricing Stamped and Metered Letters differently. The same reasons justify its continuation. Furthermore, the Commission finds that the price differential between Stamped and Metered Letters is an appropriate exercise of the Postal Service’s pricing flexibility.

Docket No. ACR2014, Annual Compliance Determination Report (Mar. 27, 2015), at 68.

GCA cannot argue that the Postal Service has failed to identify a legitimate purpose for the Metered Letters price differential. GCA also cannot argue that the Postal Service’s interest in more efficient access for small- and medium-sized businesses to encourage them to use Postal Service mail and shipping products is illegitimate or irrational. This alone is fatal to its section 403(c) claim.

Because GCA cannot deny that the Postal Service has advanced a legitimate purpose for the Metered Letters rate it must fall back on arguments that distort the application of section 403(c). GCA thus wrongly argues that section 403(c) must be rigidly construed as a strict cost-based test. But GCA fails to cite any relevant precedent to support this argument. In fact, the relevant precedent construing section 403(c) of the PAEA and comparable provisions in other statutes contradict GCA’s attempt to narrowly construe section 403(c) as a strict cost-based test. *See MOAA*, 2 F.3d at 435-36 (denying discrimination claim and upholding non-zoned pricing structure that was “unsupported by any cost principle” on the basis of the asserted policy rationale); *see also Competitive Telecom. Ass’n v. FCC*, 87 F.3d 522, 529 (D.C. Cir. 1996) (construing unlawful discrimination provisions of the Communications Act and concluding that the “FCC is not required to establish purely cost-based rates”); *National Rural Telecom Ass’n v.*

*FCC*, 988 F.2d 174, 182-83 (D.C. Cir. 1993) (affirming price cap regulation although not tied directly to cost); Docket No. R77-1, Op. at 195 (“[T]he mere fact of a difference in rate among customers in the same class is not per se unlawful.”).

GCA’s argument that section 403(c) should be narrowly construed like other “strictly defined quantitative” statutory rules in the PAEA also fails. *See* GCA Complaint at 9, 10 n.17, and 30. This argument finds no support in the text or structure of the PAEA or in decisional law construing section 403(c) or comparable provisions. Unlike the CPI price cap or the quantitative workshare limitations in section 3622(e), the undue discrimination provision is inherently qualitative. *See UPS Worldwide*, 66 F.3d at 634 (“As with the terms ‘fair’ and ‘equitable’ in § 101(d), we find it difficult to define the contours of what constitutes ‘undue or unreasonable’ discrimination or preferences. We note that other courts, when confronting this section, have accorded postal authorities broad latitude.”); *see also Orloff v. FCC*, 352 F.3d 415, 420-21 (D.C. Cir. 2003)(construing “unjust and unreasonable” discrimination language in section 202 of the Communications Act and stating that the “generality of these terms . . . opens a rather large area for the free play of agency discretion”). Courts and regulatory agencies have construed the meaning and scope of unreasonable discrimination for decades precisely because the terms do not lend themselves to a bright-line analysis. And none have construed them as GCA would here.

The same is true for GCA’s suggestion, *see* GCA Complaint at 7 n.11, that the only specific authorizations for price discrimination among similarly situated mailers are the non-profit and free-mail provisions of sections 3626 and 3403. GCA cites no support for this argument in the language or structure of the PAEA or in the legislative history because there is none. Another flaw in GCA’s newly found reliance on the general anti-discrimination provision contained in section 403(c) is that it ignores the context of the Act as a whole. If, for example, all price differentials had to be strictly cost-justified under section 403(c), the express authorization of differential pricing in section 3622(b)(8) would be superfluous, as indeed would be the worksharing provisions of section 3622(e).



This flaw also infects GCA's reliance on the only two cases it cites to support its discrimination claim, *Interstate Commerce Comm. v. Baltimore & Ohio Railroad*, 145 U.S. 263, 277 (1892), and *Transcontinental Bus Corp. v. Civil Aeronautics Board*, 383 F.2d 466 (5th Cir. 1967). These cases involved other statutes that did not include provisions such as section 3622(b)(8) and, thus, cannot simply be imported into construction of the PAEA. *See Transcontinental Bus*, 383 F.2d at 484 (stating that there are "fundamental statutory differences between the ICC Act and the FAA [Act] which affect the factors which are material to deciding whether the circumstances and conditions of service are substantially similar").<sup>7</sup> GCA cites no precedent in support of its complaint that construes the Act itself.<sup>8</sup>

GCA is forced to argue for an insupportably rigid application of section 403(c) – that it prohibits any non-workshare policy based price differential – because it cannot argue that the Postal Service has not identified a rational and legitimate basis for treating different Single-Piece First Class mailers differently. GCA's claim under section 403(c) fails as a matter of law.

#### **B. GCA's complaint does not raise a proper claim under section 3622(b)(8)**

As noted above and confirmed in the complaint, GCA's prior challenges to the Metered Letter rate relied on section 3622(b)(8). *See* GCA Complaint at 4. Before moving on to section

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<sup>7</sup> In any event, these cases undermine rather than support GCA's claim. The *Baltimore & Ohio Railroad* case *rejected* the claim that it was discrimination to sell a "party ticket" to ten riders for less than the price of ten single tickets. In doing so it also expressly rejected the notion that listing certain types of permissible discrimination meant that others were impermissible: "[T]he object of section 22 was to settle beyond all doubt that the discrimination in favor of certain persons therein named should not be deemed unjust. It does not follow, however, that there may not be other classes of persons in whose favor a discrimination may be made without such discrimination being unjust." 145 U.S. at 279. In *Transcontinental Bus* the asserted grounds for the difference in treatment were said by the court to reflect "social policy factors which are not incorporated in the Federal Aviation Act or which have not been deemed relevant in the course of the history of rate regulation in the transportation industry," and the Board was said to have no "authority to implement and effectuate social policy on a general scale" rather than relying on "factors . . . closely related to the air transportation industry." 383 F.2d at 484. The meter rate by contrast is based on well-articulated postal policy factors, not social policy factors outside the Commission's purview.

<sup>8</sup> The *GameFly* case, which GCA cites only in a footnote as to remedy, also does not support the complaint. *GameFly* had nothing to do with how the Postal Service sets different prices for different rate categories and products. The pricing considerations were only relevant as part of the harm suffered by GameFly based on the conclusion that the Postal Service unreasonably refused to provide GameFly the same special manual processing service that the Postal Service provided to Netflix for handling the same product at the same price. Because of the unjustified, disparate operational treatment, GameFly was forced to use a more expensive product. Here, there is no unjustified, disparate operational treatment and no undue or unreasonable discrimination, and the *GameFly* situation is inapposite.

403(c), GCA alleges in passing that the Metered Letter rate violates section 3622(b)(8), GCA Complaint at 2, but it effectively abandons the claim as the Complaint does not even cite section 3622(b)(8) after page 4, or discuss the provision at any point. The complaint thus does not properly allege a violation of section 3622(b)(8).

GCA attempts to justify its disregard of this provision, which expressly authorizes differential pricing within classes of mail, with the circular argument that an unreasonably discriminatory price cannot be “just and reasonable.” *Id.* at 2. Of course, it is equally true that a “just and reasonable” price cannot be simultaneously unreasonably discriminatory. GCA’s circular argument thus cannot justify its disregard of section 3622(b)(8). GCA never explains why a discount that has repeatedly been upheld as consistent with section 3622(b)(8) should nonetheless be found to violate section 403(c). Instead it essentially ignores section 3622(b)(8) entirely.

In any event, any argument that the pricing differential is unlawful because it may lead to an increase in the price of Stamped Letters would also fail as a matter of law. Under the PAEA market dominant products are protected from excessive prices by the CPI price cap. As noted at pages 1-2 and 4-5 above, the Commission has consistently and properly held that the Postal Service has the pricing flexibility to make non-uniform price adjustments within a class, citing to the plain language of section 3622(b)(8), which expressly contemplates price changes of “unequal magnitude within, between or among classes of mail.” *See, e.g.*, Docket No. R2020-1, Order No. 5373 (Dec. 20, 2019), at 45 (“The Commission notes that 39 U.S.C. § 3622(b)(8) explicitly states that Objective 8 ‘shall not be construed to prohibit the Postal Service from making changes of unequal magnitude within, between, or among classes of mail.’”).

#### IV. CONCLUSION

For all of the reasons discussed above, GCA presents no basis for the Commission to revisit its prior decisions upholding the Metered Letters rate. The Commission has repeatedly and correctly held that policy-based pricing differentials, like the Metered Letters rate, are appropriately within the pricing flexibility afforded to the Postal Service under the PAEA. GCA's claims that the Metered Letters rate violates section 403(c) fails as a matter of law because the Postal Service has identified a rational and legitimate basis for the Metered Letters rate. Accordingly, GCA's Complaint should be dismissed with prejudice.

Respectfully submitted:

\_\_\_\_\_/s/\_\_\_\_\_  
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